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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961,

No. 410

Misc.

JACKSON BREWING COMPANY,
Petitioner,

v.

THE HONORABLE BEN C. CONNALLY,
Judge of the United States District Court
for the Southern District of Texas,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS
and
PETITION FOR WRIT OF MANDAMUS

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Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Petitioner herein today filed with this Honorable Court a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C., Section 1254 (1) to review an order of said Court of Appeals dismissing, for want of jurisdiction, Petitioner's appeal in *Jackson Brewing Company v. Jack D. Clarke, Jr.*, No. 19,330 on the docket of said Court.

In the event said petition for certiorari is denied, or in the event the judgment of the Court of Appeals dismissing Petitioner's appeal is affirmed, Petitioner hereby moves for leave to file the petition for writ of mandamus hereto

annexed; and further moves that an order and rule be entered and issued directing the Honorable Ben C. Connally, Judge of the United States District Court for the Southern District of Texas, to show cause why writ of mandamus should not be issued against him in accordance with the prayer of said petition, and why your Petitioner should not have such other and further relief in the premises as may be just and meet.

CORNELIUS O. RYAN
666 Gulf Building
Houston 2, Texas

Attorney for Petitioner
Jackson Brewing Company

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THE HONORABLE BEN C. CONNALLY,
Judge of the United States District Court
for the Southern District of Texas,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Petitioner here seeks a writ of mandamus to compel the Respondent District Judge to proceed to trial in a cause pending on the docket of his Court styled Jackson Brewing Company v. Jack D. Clarke, Jr., Civil Action No. 13249, in which Petitioner is Plaintiff.

OPINION BELOW

The memorandum entries made by the Court on the motion calendar on August 9, 1961, and August 31, 1961, respectively, are the only opinion or other record of the Court's action and its reasons therefor. They are printed as Appendix "A" and Appendix "B", respectively, to this petition.

JURISDICTION

Jurisdiction of this Court is invoked under 62 Stat. 944, 63 Stat. 102, 28 U. S. C. Section 1651 (a). As more fully set out hereinafter, the Court of Appeals for the Fifth Circuit denied Petitioner leave to file a petition for mandamus on November 15, 1961. The order denying leave to file is printed as Appendix "C" to this petition.

QUESTIONS PRESENTED

The District Court stayed all proceedings in Civil Action No. 13249 pending on its docket, styled Jackson Brewing Company vs. Jack D. Clarke, Jr., until another action pending between the parties in the State Courts of Texas should have been finally determined. The Court of Appeals refused to grant Petitioner leave to file a petition for writ of mandamus to compel the District Court to proceed to trial, and on Petitioner's appeal, held that the District Court's action was not an appealable injunction under 28 U. S. C. Section 1292 (a). (1) because that action was not, in its opinion, based upon an equitable defense or counter-claim asserted by Clarke. Concurrently with the tender of this petition for mandamus, Petitioner has filed a petition for certiorari to review the judgment of the Court of Appeals dismissing its appeal. Nine copies of the record as printed for the use of the Court below were filed with that petition for certiorari, and the Court is respectfully referred to the record in that cause as an aid in the consideration of this petition. The questions presented are:

1. Whether the District Court had the power to stay all proceedings in the cause Petitioner had filed before it until a cause pending between the parties in the State Courts of Texas should be finally determined.

2. Whether, if the District Court had the power to stay all proceedings in the cause pending before it, that power was rightly exercised under the circumstances of this case.

STATUTES INVOLVED

The statutory provision involved is 62 Stat. 944, 63 Stat. 102, 28 U. S. C., Section 1651 (a) reading as follows:

"§1651. WRITS

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

Reference is also made below to 72 Stat. 348, 28 U. S. C., Section 1292 (b), which is quoted herewith for convenience, although, as set out more particularly hereafter, Petitioner does not consider it applicable:

"§1292. INTERLOCUTORY DECISIONS

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT

On July 18, 1960, Petitioner filed in the United States District Court for the Southern District of Texas, Houston Division, its complaint in Jackson Brewing Company v. Jack D. Clarke, Jr. (R. 4) (for convenience, references to the record filed in this Court in Jackson Brewing Company v. Jack D. Clarke, Jr., No. ....., will be incorporated in this statement). This was an action on a sworn account for certain beer sold and delivered by Petitioner to Clarke and for attorneys' fees as authorized by Article 2226, Revised Civil Statutes of Texas (R. 5). Jurisdiction of the District Court was based upon diversity of citizenship and the existence of the requisite amount in controversy.

Clarke's original answer consisted of a "plea in abatement" alleging the pendency of another action between the same parties in the District Court of Montgomery County, Texas, and a general denial (R. 8-9). Subsequently, after Petitioner had filed a motion for summary judgment (R. 11), Clarke filed additional pleadings which the District Court construed as raising an issue of fact (R. 19), and on the basis of which the Court denied Petitioner's motion for summary judgment, at the same time denying Clarke's plea in abatement and directing him to file an amended answer setting out any affirmative defenses to Petitioner's claim (R. 22-23). The amended answer filed in compliance with that order alleges as an affirmative defense an agreement on the part of Petitioner to cancel Clarke's indebtedness to Petitioner in consideration of Clarke's transfer of certain assets to a third party, W. L. McMillan, who was also a Defendant in the State Court suit. The burden of that pleading is that the alleged agreement between the parties should be specifically enforced so as to cancel the indebtedness which Clarke admits having owed (R. 19-21).

On May 22, 1961, Petitioner filed a second motion for summary judgment in the District Court (R. 22-A) attaching

thereto a copy of a judgment entered on April 14, 1961, in the District Court of Montgomery County, Texas, in the action pending there between the parties, by the terms of which Clarke recovered judgment against Petitioner for a sum of money as damages for alleged failure to cancel the indebtedness owed by Clarke to Petitioner (R. 36-41). In that second motion for summary judgment, Petitioner alleged that by reason of Clarke's procurement of the entry of the judgment in the Montgomery County suit, he had elected to waive his claim alleged in the Federal Court action, that he was entitled to specific performance of the alleged agreement to cancel, and that Petitioner was therefore entitled to judgment as a matter of law for the relief demanded in its complaint (R. 25-27).

On August 9, 1961, the District Judge, without ruling on the second motion for summary judgment, made an entry on the motion docket directing that no further action be taken in the cause until the judgment of the District Court of Montgomery County, Texas should have become final (R. 57). This ruling was adhered to on Petitioner's motion for reconsideration (R. 58; 67) and an appeal was duly perfected (R. 67).

On November 13, 1961, after the filing and docketing of the record on appeal, Petitioner filed a motion in the Court of Appeals, in Cause No. 19337, on that Court's docket, for leave to file a petition for mandamus against the District Judge, in the event that it should be determined that the Court of Appeals did not have jurisdiction of the appeal. The motion for leave to file was denied (R. 73; Appendix "C", infra.).

While Petitioner's appeal was pending in the Court of Appeals, the Court of Civil Appeals at Beaumont, Texas, in the State Court suit, reversed the judgment against Petitioner on the ground that the jury verdict was "so

against the overwhelming weight and preponderance of the evidence as to be clearly wrong, unjust and shocking to the conscience." *Jackson Brewing Company* v. *Clarke*, 352 S.W. 2nd 322, 324 (writ refused, n.r.e.). That cause has now been remanded to the District Court of Montgomery County, Texas, for a new trial.

The Court of Appeals dismissed Petitioner's appeal on the grounds that an order staying proceedings in the District Court is appealable under 28 U. S. C. Section 1292 (a) (1) only if (A) it is made in an action which, before the fusion of law and equity, was by its nature an action at law; and (B) the stay was sought to permit the prior determination of some equitable defense or counter-claim (R. 74). The Court said that the first of these requisites was clearly satisfied but that the second was not, in that there was no equitable defense or counter-claim asserted by Clarke.

REASONS FOR GRANTING THE WRIT

If the District Court's stay of proceedings did not constitute an appealable order, then mandamus is Petitioner's appropriate remedy.

The Court of Appeals has dismissed Petitioner's appeal from the District Court's action, and has also denied it leave to file a petition for mandamus. If this Court should leave standing the judgment of the Court of Appeals, then the application to this Court for a writ of mandamus is the only possible remedy open to Petitioner. It is Petitioner's belief that the judgment of the Court of Appeals is erroneous, and that that Court should have taken jurisdiction of its appeal. This petition for mandamus is presented for filing only as an alternative to the petition for certiorari and only in the event that the petition for certiorari should be denied, or the judgment of the Court of Appeals affirmed.

Petitioner is fully cognizant of the fact that the issuance of the writ of mandamus by this Court is "not a matter of right, but of sound discretion, sparingly exercised". Rule 30. However, as this Court said, referring to the writs of prohibition and mandamus in *United States Alkali Export Association* v. *United States*, 325 U.S. 196, 202,

> "The traditional use of such writs both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or *to compel them to exercise their authority when it is their duty to do so.*" (Emphasis added.)

For an example of this Court's use of the writ to compel the exercise of authority, see *Ex Parte Kumezo Kawato*, 317 U.S. 69, 71. There the District Court had refused to proceed to trial for the duration of the war against Japan, on the ground that the Plaintiff was an enemy alien and had no right of access to the United States Courts. This Court's opinion held that the refusal to proceed was erroneous, and mandamus was the appropriate remedy.

The contention may perhaps be made that Petitioner should have availed itself of 28 U. S. C. Section 1292 (b). However, the present case is clearly not of the kind contemplated by this provision of the statute. The District Judge did not make the written statement required, and he plainly did not make any order which involved "a controlling question of law" within the meaning of that statute, because he did not in fact rule, but affirmatively declined to rule, upon any question of law presented to him. In addition, the legislative history of that section makes it clear that it was intended to apply to a wholly different situation than that presented here. S. Rep. No. 2434 85 Cong., 2d Sess. (1958).

The issuance of the writ would also be in aid of this Court's appellate jurisdiction. The Respondent District Judge obviously anticipates that a final judgment in the State Court suit will be res judicata of the issues between the parties, and that entry of a judgment in the Federal Court suit will be a mere formality. In that event, federal appellate jurisdiction will have been destroyed. Petitioner will then have no recourse whatever against the action of the District Court which in effect forces it to have the facts in this law suit determined exclusively by a State Court jury in the home county of the opposing party, where it has already been judicially determined that Petitioner did not receive a fair trial on the facts, and where no better result can be hoped for in the future. Under Texas law, no more than two trials can be granted to Petitioner "because of insufficiency or weight of the evidence." Rule 326, Texas Rules of Civil Procedure. What the jury says three times is so, regardless of how badly it may shock the conscience of the Court.

The stay of proceedings in this case can not be justified either as an exercise of the doctrine of abstention or as a regulation by the Court of its own docket.

There are two possible contentions which may be urged to justify the District Court's action. One is that it properly abstained from the exercise of its jurisdiction pending the determination of the related State Court litigation; the other is that its action merely constituted a proper exercise of its discretion in regulating its own docket. It goes without saying, of course, that the litigation below, being an ordinary suit *in personam*, is not subject to the rule that the Court which first obtains jurisdiction has exclusive jurisdiction, and the 13 day priority in time of Clarke's State Court suit (R. 8) is therefore immaterial. Compare

Princess Lida v. *Thompson*, 305 U. S. 456 with *Kline* v. *Burke Construction Company*, 260 U. S. 226.

It is clear, however, that this case cannot be brought within the principles of abstention as they have been laid down in previous opinions of this Court. In the recent cases of *County of Allegheny* v. *Frank Mashuda Company*, 360 U.S. 185, and *Louisiana Light & Power Company* v. *City of Thibodaux*, 360 U.S. 25, decided on the same day at the close of the October, 1958 term, this subject was canvassed at length. The circumstances under which abstention may be proper were detailed in Mr. Justice Brennan's opinion for the Court in the *Mashuda* case, 360 U.S. 187-89. Briefly they are that (1) the case presented a federal constitutional issue which might be mooted or presented in a different posture by a State Court determination of pertinent State law, (2) that the exercise of jurisdiction by a Federal Court would disrupt a State administrative process, interfere with the collection of State taxes, or otherwise create needless friction by unnecessarily enjoining State officials from executing domestic policies, and (3) that some difficult or unusual question of State law which the Federal Court had to apply should first be authoritatively settled in the State Courts. The relevant passages from this opinion are quoted at length in the record in *Jackson Brewing Company* v. *Jack D. Clarke, Jr.*, No. ..... (R. 60-62).

Although a majority of the Court did not agree with Mr. Justice Brennan that the abstention which was disapproved in the *Mashuda* case should also be disapproved in the *Thibodaux* case, there is no indication, in any of the opinions filed in either of those cases, that there was any substantial disagreement with his analysis of the basis of the abstention doctrine in his opinion for the Court in the *Mashuda* case and in his dissenting opinion in the *Thibodaux* case. The only point of difference was whether the "exceptional circumstances" which "would clearly serve an

important countervailing interest" (360 U.S. 188) did or did not exist on the facts of each particular case.

There is no suggestion here that there are or can be any exceptional circumstances to justify the District Court's action or that any important countervailing interest will be served by remitting the parties exclusively to the State Court. This is a simple suit for debt between private parties. No federal constitutional question is or can be present. The exercise of jurisdiction by the Federal Court would not affect in any way any State administrative action or create friction with officials of the State or of any department or subdivision thereof. There are involved no difficult or unusual questions of State law. There is, consequently, nothing here which can give the District Court discretion to abstain from the exercise of jurisdiction in the circumstances of this case.

In *Landis* v. *North American Company*, 299 U.S. 248, it was held that a Federal District Court had discretion to stay proceedings in a case before it awaiting further action in a related case pending in another Federal District Court. Although we can find no decision in which the subject is explicitly discussed, we think that a comparison of the *Landis* opinion with those in *Mashuda* and *Thibodaux* makes it clear that the situation in which two cases are pending in different Federal Courts has no relation to the situation in which one action is pending in a Federal Court and another in a State Court. In the first instance, a stay or other delay by one of the Federal Courts does not involve any abdication of federal jurisdiction. In the second case, that action obviously does involve such an abdication. Except to the extent that it has been modified by the growth of the doctrine of abstention in the last generation, it would seem that the principle that a Federal Court must exercise jurisdiction which is properly conferred upon it, *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 404, *Hyde* v. *Stone*, 61

U. S. (20 How.) 170, 175, still possesses vitality. It is the foundation of Mr. Justice Brennan's opinion for the Court in *Mashuda*, as well as his dissenting opinion in *Thibodaux*. See also Wright, "The Abstention Doctrine Reconsidered" 37 Tex. L. R. 815 (1959).

But even if the rationale of *Landis v. North American Company* were applicable here, Mr. Justice Cardozo's opinion in that case held that a stay which was to continue in effect until the other suit had been finally determined on appeal exceeded "the limits of a fair discretion", and could not be justified (299 U. S. 256). The only stay which the Supreme Court actually authorized in that case, even by implication, was one until the other suit should have been decided in the District Court; but the opinion makes clear that even a stay of that duration must be reasonably supported by the party requesting it (299 U. S. 258). There is no intimation whatever that a District Judge is free to stay proceedings on his own motion for no reason at all except that the other cause is pending, or may perhaps be decided before the present cause.

CONCLUSION

Petitioner believes this petition for mandamus to be unnecessary, because the Court of Appeals should have taken jurisdiction of its appeal; however, if Petitioner should be wrong in that belief, then it is clear that mandamus is the only remedy available to it. The District Court cannot refuse to hear or try Petitioner's action, simply because a related suit is pending in the State Courts, without denying to Petitioner the prompt justice to which it is entitled in the Federal Courts. Petitioner respectfully submits that the District Court's action is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and

for the issuance of the writ of mandamus to require the District Court to proceed to trial.

Respectfuly submitted,

CORNELIUS O. RYAN
666 Gulf Building
Houston 2, Texas

Attorney for Petitioner

APPENDIX "A"

ENTRY MADE BY COURT ON CALENDAR SHEET 8/9/61

On Plaintiff's Second Motion for Summary Judgment.

I am unable to see why the issues between the parties herein were not fully litigated either in the State Court proceedings in Montgomery County, Texas or in the present proceeding. As it appears that trial has been had and a judgment entered in the State Court proceeding, and said judgment is on appeal, no further action will be taken hereon until that proceeding is finally determined. Hence, the Motion for Summary Judgment, and other issues which may arise, will be considered after finality of the State Court judgment. Counsel will advise the Court in the Premises. C.

APPENDIX "B"

ENTRY MADE BY THE COURT ON CALENDAR SHEET 8/31/1961

Motion to reconsider is denied. This Court will consider any questions properly before it on learning what issues are disposed of finally by the prior state court proceeding. C.

APPENDIX "C"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19337

JACKSON BREWING COMPANY,

Petitioner,

v.

THE HONORABLE BEN C. CONNALLY, District Judge,

Respondent.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

BY THE COURT:—

Leave to file Petition for Writ of Mandamus in the above entitled and numbered cause is hereby DENIED.

Dated:

November 15, 1961

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v.

JACK D. CLARKE, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT

Because this petition seeks review of an entry made by a Federal District Court on his calendar sheet, (Tr. 57) there are no findings of fact, conclusions of law, or judgment from which the facts can be established. Furthermore, because the entry was a pre-trial order, there is no evidence to which to refer. Except where the parties in their pleadings agree, or where the United States Court of Appeals has made a statement of fact, the facts must be stated as allegations.

The Petitioner, the Jackson Brewing Company, had a distributorship contract with Respondent, an individual, for the area in and around Conroe, Texas (Tr. 4-6, 17).

The Petitioner cancelled that contract and awarded to a third party. (Tr. 18, 53). A dispute arose between the Petitioner, the Respondent and the new distributor as to the terms and conditions surrounding the termination of the contract. One item of controversy was whether $12,000 was still due the Petitioner. The Respondent filed suit in the state court (Tr. 8, 12, 14-16). Before even answering the Respondent's petition in the state court, the Petitioner filed an action in the Federal District Court (Tr. 58). In the words of the Court of Appeals, "the factual issue about which the litigation revolves is whether, at the time of termination, the [Petitioner] agreed with [the Respondent] to cancel the $12,000 indebtedness in partial consideration for [Petitioner's] transfer of the assets of the distributorship to the third party . . ." (Petition, p. 2a, 303 F. 2d 844). After the Respondent had secured a judgment in the state court against Petitioner, the Petitioner moved for a summary judgment in the Federal Court on the theory that, by taking the judgment against the Petitioner, the Respondent had elected to waive his claim as a defense to Petitioner's Federal Court action (Tr. 22a, 25-27). Respondent pleaded the state court judgment as being res judicata. (Tr. 42, 46). Since both parties were relying on the state court judgment, the Federal District Court postponed ruling on the motion for summary judgment until the judgment became final. (Tr. 57).

The Petitioner then unsuccessfully sought mandamus. (Petition, p. 3a). Following that, it sought an interlocutory appeal in the Court of Appeals. While the appeal was pending the state court judgment was reversed and remanded. *Jackson Brewing Co.* v. *Clarke*, 352 S.W. 2d 322 (writ refused, n.r.e.).

The Court of Appeals dismissed the appeal (303 F. 2d 844), and the Petitioner seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

(1) There is no final judgment in either the District Court or the Court of Appeals which disposes of all the issues between the parties. Ordinarily such interlocutory appeals lack sufficient significance to merit review in the Supreme Court. *American Const. Co.* v. *Jacksonville, T. & K. W. Ry.* 148 U.S. 372, 384; *Panama Railroad* v. *Napier*, 166 U.S. 280; *Denver* v. *New York Trust Co.*, 229 U.S. 123, 133. Since the ruling of the Court of Appeals will not affect the outcome of the litigation in the District Court, it is difficult to bring the instant case within an exception to the established rule. See, e.g., *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682; *Land* v. *Dollar*, 330 U.S. 731; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251.

(2) The basis of Petitioner's motion for summary judgment in the Federal District Court was a theory based upon a judgment granted in a state court. That state court judgment has been vacated and remanded by the Texas Court of Civil Appeals. Thus, the issue of whether the District Court should hear the Petitioner's motion for summary judgment based on that state judgment is now totally abstract and hypothetical. Accordingly, the issue is moot. *Tregea* v. *Board of Directors*, 164 U.S. 179; *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 616. See *Muskrat* v. *United States*, 219 U.S. 346.

(3) The Court of Appeals for the Fifth Circuit correctly held that the postponement of a ruling on a motion for summary judgment by the District Court did not constitute an "interlocutory order . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ." under 28 U.S.C.

§1292(a)(1). The Petitioner has taken it upon himself to characterize Respondent's theory in the Federal District Court as one of specific performance of a contract in order to invoke a fiction that the District Judge's calendar sheet entry was an injunction to restrain himself from considering an issue of law, *cf. Baltimore Contractors* v. *Bodinger*, 348 U.S. 176; *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254. The Court of Appeals correctly characterized the problem as follows: "The State action involved simply a legal claim for breach of contract, and it presented essentially the same legal issues as were raised by the pleadings in the federal action." (Petition, p. 4a) Therefore, "there is no basis for holding that the stay order issued by the District Court was equivalent to an injunction and, as such, appealable under §1292(a)(1)." (Petition, p. 4a) All the Petitioner really seeks is a review of the District Court and the Court of Appeals' characterization of the Respondent's theory of his cause of action.

(4) This case presents no conceivable problem involving the abstention doctrine. See *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185; *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25. Here the Federal District Court did not stay its own proceedings in order to allow a state court to proceed to judgment — the Federal Judge made his calendar sheet entry because it appeared that the state court had *already* entered judgment. See, e.g., *Pa. Gen. Cas. Co.* v. *Pa. ex rel Schnader*, 294 U.S. 189; *Kline* v. *Burke Constr. Co.*, 260 U.S. 226. Thus, the decision of the Court of Appeals dismissing the interlocutory appeal does not establish a doctrine limiting federal diversity jurisdiction.

(5) Any problems involving a conflict between the state and federal judiciary have been created by the Petitioner. First, the Respondent filed suit against the Petitioner and

the new distributor in the state court (Tr. 14). That court had jurisdiction over the controversy and over the parties, and was capable of resolving the dispute. Because citizens of Texas were on both sides of the controversy, the state court action was not removable. See, *Strawbridge* v. *Curtiss*, 3 Cranch 267; 28 U.S.C. §1441. The Petitioner, in an effort to circumvent the constitutional requirement of diversity of citizenship, carved out a portion of the controversy in the state court and filed suit in the Federal Court. In this circumstance, it is difficult to perceive how the Petitioner has been deprived of a constitutional right.

Second, the Petitioner has used the Federal Court as a shield to avoid litigating the whole controversy in the state court. Rule 97(a) of the Texas Rules of Civil Procedure, following Fed. R. Civ. P. 13, requires that a defendant file a counterclaim for any cause of action he may have arising ont of the same transaction or occurrence upon which the plaintiff's suit is based. Obviously, the contract in question is such a transaction or occurrence, and the Petitioner should be required to make his claim in the state court. However, the Texas Rule specifically excuses the filing of a compulsory counterclaim when that claim is the subject of a pending suit in another court. When the Petitioner was served with notice of the Respondent's suit in the state court, the Petitioner immediately filed his action in the Federal Court before answering in the state court. This ploy was admittedly intended to allow the Petitioner to circumvent the operation of the Texas Rules and brought about an unnecessary conflict between the state and federal courts (Tr. 58).

Furthermore, the resulting multiplicity of suits has operated to whipsaw the individual Respondent between the state and federal courts, causing him unnecessary costs and expenses.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be denied.

By .....
Attorneys for Respondent

CERTIFICATE OF SERVICE

This is to certify that on the .. day of October, 1962, a true and correct copy of this Brief in Opposition was served upon Mr. Cornelius O. Ryan, 666 Gulf Building, Houston 2, Texas, by placing the same in an envelope addressed to him, postage prepaid, by certified mail, and deposited in the United States mails.

.....

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JACKSON BREWING COMPANY,

Petitioner,

v.

JACK D. CLARKE, JR.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1962

No. 410

Jackson Brewing Company,

Petitioner,

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Jack D. Clarke, Jr.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner, JACKSON BREWING COMPANY, files herewith its petition for rehearing herein, and as a basis for such petition would respectfully show the court the following:

I.

After the filing of the petition for certiorari in this court on September 5, 1962 there were published in the Federal Reporter Advance Sheets two opinions from different Circuit Courts of Appeal, *Local No. 338* v. *Dairymen's League Co-Operative Association, Inc.* (CA-2 1962) 304 Fed. 2d 913, and *Lutes, et al* v. *District Court* (CA-10 1962) 306 Fed. 2d 948, which indicate a direct conflict between those Circuits on the basic problem, presented as questions two and three in the petition for certiorari, of whether a District Court may stay proceedings before it solely on the ground that related litigation is pending in a State Court.

II.

In *Local No. 338* v. *Dairymen's League, supra,* the union had applied to the Federal District Court for an injunction to maintain the status quo between the parties pending the arbitration of a dispute. The District Court decided that, since the same dispute was already pending in the New York State Courts, no injunction should be issued, and the Federal Court action should be stayed to await the completion of the State Court proceedings. On the Union's appeal from the refusal to grant the injunction, the Court of Appeals held that since the stay of proceedings on the merits was proper, there was no abuse of discretion in the refusal to grant an injunction. In connection with the stay of proceedings the court made the following comment:

> "It is an established rule in this Circuit that the District Court has the power to stay its proceedings if there is a prior action involving the same dispute pending in the State Courts. Mottolese v. Kaufman, 2 Cir. 1949, 176 F. 2d 301; P. Beiersdorf & Co. v. McGohey, 2 Cir. 1951, 187 F. 2d 14; Ferguson v. Tabah, 2 Cir. 1961, 288 F. 2d 665; Ballantine Books, Inc. v. Capital Distributing Co., 2 Cir. 1962, 302 F. 2d 17. . . . . ." (Page 915).

III.

In *Lutes* v. *District Court, supra,* nineteen different suits had been filed in the Federal District Court involving the interpretation of certain oil and gas leases. After some, but not all, of these nineteen cases were filed, the defendant in the Federal Court suits had brought suit in the State Court to determine the same questions presented in the Federal Court cases. Thereupon, on application of the defendant in the Federal Court, the District Court stayed the proceedings before it until the State Court suits should be decided.

In determining that the District Court had abused its discretion, and that a writ of mandamus should be issued to require the Court to proceed with and determine the actions pending before it, the Court of Appeals wrote in part as follows:

> "We have before us routine contract cases in which private parties disagree as to the effect of private contract provisions. The issues do not present any federal or state constitutional or statutory questions. No public officials or public agencies will be affected by the result. No hazard of a disturbance in the sensitive field of federal-state relationships is suggested. If we were to forego the exercise of the properly invoked diversity jurisdiction until state court decisions were obtained on identical contracts applying to identical facts, then the doctrine of abstention is extended far beyond any limits which have as yet been fixed by the Supreme Court of the United States and an easy method is afforded the district courts for the avoidance of decisions in difficult cases." (Pages 949-950)

IV.

Petitioner submits that the above analysis is exactly applicable to the facts of the present case. It is true that in the *Lutes* case the court made some reference to the fact that federal jurisdiction was properly invoked before the state court cases were filed, but it is also true that some of the federal court cases were filed after the initiation of the state court suits. In any event, the question presented here should not be made to depend upon who wins a race to the courthouse, especially when the difference in filing time is merely a matter of days.

V.

It is clear from a comparison of the above cases that in the Second Circuit a district judge has complete discretion to stay proceedings pending the determination of related and prior state court litigation, whereas in the Tenth Circuit he has no such discretion, except under the principles laid down by this court in the abstention cases cited in the petition for certiprari. On the basis of its action in refusing to entertain Petitioner's motion for leave to file petition for mandamus the Court of Appeals for the Fifth Circuit must be aligned on this question with that of the Second. It is therefore clear that a conflict of decisions among the Circuits now exists, which was not apparent when this case was originally filed in this court. It is also clear that the question presented is one of substantial importance in the administration of justice in the federal courts and that a uniform rule, applicable in all circuits, is essential "to secure the just, speedy, and inexpensive determination of every action." Rule 1, FRCP.

Wherefore, premises considered, petitioner respectfully requests that this petition for rehearing and its petition for writ of certiorari herein, be granted.

Cornelius O. Ryan
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Attorney for Petitioner,
Jackson Brewing Company

I certify that the above and foregoing petition for rehearing is presented in good faith and not for delay.

.....

CORNELIUS O. RYAN
Attorney for Petitioner
Jackson Brewing Company

PROOF OF SERVICE

I, Cornelius O. Ryan, counsel of record for Jackson Brewing Company, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I served a copy of the above and foregoing petition for rehearing in this cause upon Respondent Jack D. Clarke, Jr. by delivering a copy to a clerk in the office of Walter E. Workman, Esq., one of his counsel of record, at 1600 Esperson Building, Houston 2, Texas, on the ..... day of November, 1962.

.....

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